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In the

Supreme Court of the United States

October Term, 1994

DEL ORO HILLS,
Petitioners,

v.

CITY OF OCEANSIDE,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER DEL ORO HILLS

* JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER DEL ORO HILLS

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating cases affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___ , 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Given its public policy perspective and experience, Pacific Legal Foundation believes it can provide additional insight with respect to the issues before this Court in the present case. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the clerk of the Court.

SUMMARY OF ARGUMENT

Who is responsible for the injury suffered by a property owner as a result of a local growth control initiative that is subsequently declared to be unlawful. The landowner? Or should the taxpayers who passed the measure and inflicted the injury be required to pay? The answer to this question will follow from this Court's determination of exactly what is the proper standard for determining a regulatory taking.

This Court should grant the petition for writ of certiorari because the decision of the California Court of Appeal directly threatens a central analytical pillar of takings law. It has long been settled that a land use regulation effects a taking in at least two discreet instances: (1) where the regulation fails to substantially advance legitimate government interests; ***or*** (2) where the regulation denies an

owner economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). ***Either*** instance is sufficient to trigger a taking under the Fifth and Fourteenth Amendments; these amendments also require governments to pay just compensation for takings. With respect to a regulation that is later declared to be unlawful, because such a regulation fails to substantially advance a legitimate governmental interest, it may result in a taking and compensation would be due--at least for the period of time in which the offending regulation was in effect. *See First English 482 U.S.* at 321.

Surprisingly, the Court of Appeal below rejected this established "either/or" formulation, insisting instead that a landowner satisfy ***both*** elements of the analysis before a taking may be found. This unprecedented departure from bedrock takings principles contradicts virtually every major United States Supreme Court takings decision in the last 15 years, not to mention scores of state and federal court decisions. Worse, it undermines crucial constitutional protections that shield property owners from arbitrary and abusive government regulations.

Despite this Court's disjunctive interpretation of the two-pronged *Agins* test, many lower state and federal courts interpret the *Agins* test in ways that are varied and unpredictable. While the disjunctive interpretation predominates, at least five other implicit and explicit applications of the *Agins* test exist. To resolve the lower courts' confusion in favor of the disjunctive interpretation of the *Agins* test, amicus Pacific Legal Foundation strongly urges this Court to grant the petition for certiorari.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I

THE OPINION OF THE COURT OF APPEAL CONTRADICTS WELL-ESTABLISHED PRINCIPLES OF TAKINGS LAW

In *Agins v. City of Tiburon*, this Court established the present framework for evaluating regulatory takings claims: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation], ***or*** denies an owner economically viable use of his land [citation]." 447 U.S. at 260 (emphasis added). Expressly stated in the ***dis***junctive, the *Agins* test provides two independent bases on which a taking may be found: a taking arises whenever the government violates *either* prong of the formulation. The independence of each prong of the two-prong *Agins* test has been reiterated by this Court in nearly every major regulatory takings case in the last 15 years.[1]

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[1] *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 316 (1994); *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 813; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *see also Yee v. City of Escondido*, 118 L. Ed. 2d at 169 (restating and providing additional citations for petitioners' first prong argument); *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part; dissenting in part) (restating *Agins* test and noting the independence of its prongs); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting) (restating *Agins* test).

For instance, this Court in *Yee v. City of Escondido* explicitly stated that a claim that a regulation fails to substantially advance a legitimate state interest (*i.e.*, a first prong *Agins* challenge) "***does not depend on the extent to which [the property owners] are deprived of the economic use of their particular pieces of property.***" 118 L. Ed. 2d at 169 (emphasis added); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (these are "entirely separate question[s]"). Numerous state decisions and dozens of federal cases have also recited and relied on the disjunctive *Agins* test.[2]

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[2] Regarding state cases, *see, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (holding that imposed exaction of land was regulatory taking because exaction did not relate to impact of plaintiffs' proposed development); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) (holding that arbitrary and capricious government action did not advance legitimate state interest and thus was a regulatory taking); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (1995) (adopts *Agins* disjunctive test in reviewing transportation impact fees).

Regarding federal cases, *see, e.g., Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("a regulation effects a taking if it ***either*** (1) 'does not substantially advance legitimate state interests,' ***or*** (2) 'denies an owner economically viable use of his land'") (emphasis in original); *McDougal v. County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991) (reciting the two-prong *Agins* test in the negative voice); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989) (reciting two-prong *Agins* test).

The two-prong *Agins* test can also be phrased in a negative voice with no alteration of its meaning. For instance, in its most recent affirmation of the *Agins* test, this Court in *Dolan v. City of Tigard*, 129 L. Ed. 2d at 316, stated: "A land use regulation ***does not*** effect a taking if it 'substantially advance[s] legitimate state interests' ***and*** does not 'den[y] an owner economically viable use of his land' [citation to *Agins*]." (Emphasis added.) *See also Nollan v. California Coastal Commission*, 483 U.S. at 834 (also stating the *Agins* test in the negative voice). Though the emphasis is somewhat different, the negative voice rendition (no less than the positive voice rendition) makes it perfectly clear that for a land use regulation to pass muster under the Takings Clause, it must substantially advance legitimate state interests ***and*** leave an owner with economically viable use of his property. If either one of these conditions is violated, the government has effected a taking. The taking of property is constitutional only when accompanied by just compensation. U.S. Const., Art. V; Cal. Const., Art. I, § 19.

The opinion below contradicts these well-established principles by denying that either prong of the *Agins* test is sufficient to establish a taking: "[W]e cannot accept Del Oro's theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law." *Del Oro Hills*, 31 Cal. App. 4th 1060, 1079 (1995). The Court of Appeal further held:

> In *Nollan*, *Lucas*, and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. *In light of later authority, Agins did not establish an "either/or" type of test.*

Id. (emphasis added).

This conclusion is patently wrong. And it is flatly contradicted by the very cases the opinion cites.

Nollan v. California Coastal Commission involved an attempt by the California Coastal Commission to exact a public easement from a private property owner as a condition for a permit to build a house. 483 U.S. at 827-28. This Court ultimately struck down the exaction under the first prong of the *Agins* test, *i.e.*, for failing to substantially advance legitimate state interests and thus effecting an unconstitutional taking of property without just compensation. *Id.* at 837 and 841-42. This Court never suggested, however, that the exaction of a simple use easement deprived the Nollans of economically viable use of their property. Quite the contrary, by the time this Court heard the case, the Nollans had already constructed a new house on their beachfront lot. *Id.* at 829-30. More importantly, this Court expressly rejected the opinion of the California Court of Appeal that the Nollans' takings claim was invalid because they had not been deprived of all reasonable use of their property. *Id.* at 830 and 837; *see Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723 (1986). Therefore, the statement by the court below that the issue of "economically beneficial use" was somehow "inextricably interlinked" with the "analysis of the takings issue" in *Nollan* is incorrect. Economically beneficial use was never at issue in *Nollan.*

Lucas v. South Carolina Coastal Council likewise contradicts the notion that both prongs of the *Agins* test must be satisfied before a taking may be found. Whereas *Nollan* was a purely ***first*** prong *Agins* case, *Lucas* was a purely ***second*** prong *Agins* case. In *Lucas* the validity of the challenged regulation was conceded by the property owner and assumed by the Court. 120 L. Ed. 2d at 808. There was never any question that the regulation substantially advanced legitimate state interests and thus met the standards of *Agins*' first prong. Still, this Court held that, absent some

preexisting limitation in the land's title, the property owner was due compensation for a taking under *Agins'* second prong solely on account of the economic impact of the regulation.[3] *Lucas*, 120 L. Ed. 2d at 815-16 and 820. As it did in *Nollan*, the Supreme Court in *Lucas* found a compensable taking where only one prong of the *Agins* test was violated.[4] ***In doing so it rejected the holding of the South Carolina Supreme Court that both prongs of Agins had to be satisfied for a compensable taking--the very position the court below has taken.*** *See Lucas v. South Carolina Coastal Council*, 304 S.E.2d 895, 901-02 (S.C. 1991) (no taking arises when government advances a legitimate police power interest even if all economically viable use is denied), *rev'd*, 120 L. Ed. 798 (1992).

Finally, the Supreme Court in *Dolan v. City of Tigard*--the final case the Court of Appeal cites for the false notion that economic impact is always intertwined with the takings inquiry--made it clear that its takings analysis rested solely

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[3] The Supreme Court indicated that no compensation would be due for denial of all economically viable use if the state were merely preventing a traditional common law nuisance or enforcing a preexisting limitation in the property's title. *Lucas*, 120 L. Ed. 2d at 820-21.

[4] It is also worth noting that in *Lucas* the Court again stated the *Agins* test in the positive voice originally used in *Agins:* "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*' [Citation to *Agins*.]" *Lucas*, 120 L. Ed. 2d at 813 (emphasis in original). The Court of Appeal's implication that the Supreme Court has somehow backed off the "either/or" standard originally elaborated in *Agins*, *Del Oro Hills*, 31 Cal. App. 4th at 1079, has no merit.

on the first prong of the *Agins* test. The Court explicitly stated that the economic impact of the challenged regulation had nothing to do with the Court's decision to invalidate a regulation as an unconstitutional taking. 129 L. Ed. 2d at 316 n.6 ("There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot."). As in *Nollan*, the challenged regulation failed to substantially advance a legitimate government interest as required by the first prong of the *Agins* test.

If a regulation effects a taking under *Agins* because it fails to substantially advance a legitimate governmental interest, then the responsible governmental agency may rescind the offending regulation, or it may decide to simply condemn property adversely affected. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 321. In either event, compensation is due at least for the period of time in which the regulation was in effect. *Id.*

In sum, the Court of Appeal's holding that both prongs of the *Agins* test must be satisfied before a taking may be found directly conflicts with one of the most deeply rooted doctrines in takings law. No precedent exists to support this conclusion and the Court of Appeal lacks authority to contradict the United States Supreme Court on the interpretation of federally guaranteed constitutional rights.

II

CONFUSION PREVAILS AMONG STATE COURTS AND FEDERAL CIRCUIT COURTS REGARDING THE CORRECT APPLICATION OF THE TWO-PRONG AGINS TEST

Although this Court's precedent supports the disjunctive interpretation of the *Agins* test, lower state and federal courts lack uniformity in their application of *Agins* to regulatory takings. The following analysis demonstrates that among state and federal courts, at least six different applications of the *Agins* test exist. It is not that all these formulations are wrong; some are quite cogent and practical; others considerably less so. The problem is that in trying to determine whether a regulation constitutes a taking, property owners and government regulators are buried in a morass of contradictory doctrinal confusion. Thus, further guidance from this Court regarding the proper application of the *Agins* test would facilitate much needed consistency and predictability in regulatory takings doctrine.

A. Some Courts Properly Apply the Disjunctive Test

The disjunctive application recognizes both prongs of the *Agins* test. Furthermore, it presumes that satisfaction of either prong suffices to constitute a regulatory taking. *Seawall Association v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), exemplifies the line of cases supporting the disjunctive application of the *Agins* test.[5]

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[5] *See also McDougal v. County of Imperial*, 942 F.2d at 677 (reciting disjunctive *Agins* test in negative voice); *Kelly v. Tahoe Regional Planning Agency*, 855 P.2d 1027, 1033 (Nev. 1993) (reciting disjunctive *Agins* test); *Miller v. Columbia River Gorge Commission*, 848 P.2d 629, 630 and 630 n.1 (Or. Ct. App. 1993) (acknowledging that taking

(continued...)

In *Seawall*, real estate developers challenged a local law that prohibited conversion or demolition of single-room occupancy properties. *Id.* at 1060. The law also required owners to restore such properties and indefinitely lease them at controlled rents. *Id.* at 1061. The developers claimed that the local law was invalid and violated the Federal and State Constitutions as a regulatory taking. *Id.* The New York Court of Appeals reasoned that the challenged law did not substantially advance legitimate state interests because the defendants did not show the required nexus between the law and its purpose--the reduction of homelessness. *Id.* at 1069. Moreover, the Court of Appeals determined that the local law's requirement that owners indefinitely lease their properties at controlled rents denied property owners economically viable use of their property. *Id.* at 1068. Reversing the decision of the New York Supreme Court, *id.* at 1062, the Court of Appeals held that under either prong of the *Agins* test, the regulation was invalid and constituted a regulatory taking. *Id.* at 1068-69.

Other cases have found a regulatory taking under the first prong of the *Agins* test without proceeding to analyze the second prong.[6] *Manocherian v. Lenox Hill Hospital,*

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[5] (...continued)
occurs if either prong of *Agins* test is satisfied); *Gardner v. New Jersey Pinelands Commission*, 593 A.2d 251, 257 (N.J. 1991) (reciting disjunctive *Agins* test in negative voice).

[6] *See, e.g., Schultz v. City of Grants Pass,* 884 P.2d at 573 (holding that imposed exaction of land was regulatory taking because exaction did not relate to impact of plaintiffs' proposed development); *Whitehead Oil Co. v. City of Lincoln,* 515 N.W. 2d 401 (holding that arbitrary and capricious government action did not advance legitimate state interest and thus was regulatory taking).

643 N.E.2d 479 (N.Y. 1994), represents this line of disjunctive application cases. In *Manocherian*, apartment owners challenged a city ordinance requiring them to offer renewal leases on apartments to a nonprofit hospital. *Id.* at 480. The New York Court of Appeals opined that the challenged ordinance did not substantially advance the ordinance's stated purpose to lessen the emergency housing shortage. *Id.* at 485. Rather, it subsidized the hospital. *Id.* at 484. Accordingly, the Court of Appeals reversed the decision of the New York Supreme Court and held that the challenged ordinance constituted a regulatory taking. *Id.* at 486. The Court of Appeals concluded that in light of the ordinance's failure to pass the first prong of the *Agins* test, analysis of the second prong was unnecessary. *Id.* at 486-87.

B. Some Courts Confuse Agins and Embrace a Conjunctive Test

Despite seemingly clear contrary authority, a minority of lower courts maintain that the *Agins* test is conjunctive. Similar to the disjunctive application, the conjunctive application recognizes both prongs of the *Agins* test. It does not, however, acknowledge a regulatory taking unless the plaintiff has satisfied ***both*** prongs. Thus, under the conjunctive application, one who alleges a regulatory taking must prove both that the regulation fails to substantially advance a legitimate state interest and that the regulation denies the owner economically viable use of her property.

Other than the California Court of Appeal's decision in *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th at 1060, only one other lower court decision supports the conjunctive application of the *Agins* test. *See Gerijo, Inc. v. City of Fairfield*, 638 N.E.2d 533 (Ohio 1994), *cert. denied*, __ U.S. __, 130 L. Ed. 2d 1068 (1995) (applying conjunctive *Agins* test). In *Gerijo*, the Ohio Supreme Court reversed the appellate court's finding that a zoning ordinance which fails to substantially advance a legitimate state interest is

invalid as a regulatory taking. Relying on lower state court decisions, the Ohio Supreme Court held that to prove a regulatory taking, the plaintiff must prove both that the regulation fails to substantially advance a legitimate state interest and that it denies the owner economically viable use of her property. *Id.* at 230-31. The court in *Gerijo* did not acknowledge this Court's decision in *Agins*. *Id.* at 231 (Pfeifer, J., dissenting).

C. A Few Courts Have Adopted What Can Best be Described as an Exclusive Substantive Due Process/Effective Conjunctive Test

The exclusive substantive due process application either explicitly or implicitly analyzes the first prong of the *Agins* test as a substantive due process claim. As with the conjunctive application, however, it consistently requires satisfaction of the second prong in order to find a regulatory taking that merits just compensation. For this reason it shall be referred to as the effective conjunctive application.

The Eleventh Circuit Court of Appeals employed the effective conjunctive application in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). There, the plaintiff advanced a substantive due process claim on the basis that a county zoning ordinance was unconstitutional as applied to his property. *Id.* at 718. Plaintiff sought both declaratory relief and compensatory damages. *Id.* The Court of Appeals in *Eide* analyzed both prongs of the *Agins* test as separate claims. *Id.* at 721. Neither mentioning nor analyzing this Court's decision in *Agins*, the Court of Appeals stated in *dicta* that "arbitrary and capricious due process" is the theory under which to challenge a regulation that is arbitrary and capricious, not takings doctrine. *Id.* at 722. Thus, the Court of Appeals effectively determined that a claim brought under the first prong of *Agins*, the legitimate state interest requirement, is a due process claim, not a takings claim. While the court

averred that damages might be available, where this formulation leaves the heightened scrutiny takings standard of *Nollan* is in doubt. *See Nollan*, 483 U.S. at 834 n.3.

In contrast, to bring a "due process takings claim" the Court of Appeals stated that the plaintiff must establish that the challenged regulation destroyed the value of her property, effectively taking the property by eminent domain. *Id.* at 722. The "due process takings claim" resembles the second prong of the *Agins* test which requires that the challenged regulation deny the owner economically viable use of her property.

Hence, under *Eide*, merely satisfying the first prong of the *Agins* test apparently never amounts to a regulatory taking. Accordingly, to establish a regulatory taking the effective conjunctive application always requires plaintiffs to satisfy the second prong of the *Agins* test.[7]

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[7] *See also Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1274-75 (8th Cir. 1994) (stating that arbitrary and capricious government action constitutes "arbitrary and capricious due process" claim and that "due process takings claim" requires showing that regulation destroys owner's property value); *Bello v. Walker*, 840 F.2d 1124, 1128-31 (3d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (analyzing arbitrary and capricious government action as substantive due process claim, holding that takings claim requires showing that owners have lost all use of property); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377, 1384 (Fla. Dist. Ct. App. 1994), *cert. denied*, _ U.S. _, 63 U.S.L.W. 3890 (1995) (rejecting plaintiff's inverse condemnation claim on ground that satisfaction of first prong of *Agins* was insufficient, stating that "[the lower court's decision in plaintiff's favor] was an understandable

(continued...)

Because *Eide* discussed these issues primarily in dicta, and did not apply each formulation to the allegations in the case, it is difficult to be certain exactly how inconsistent the formulations are with the precedent of this Court regarding standards of review and burdens of proof as outlined in *Nollan* and *Dolan*. In any event, the rather ambiguous tautology of the Eleventh Circuit points out the doctrinal conflict inherent in cases like *Del Oro Hills*.

D. Application of a Nonexclusive Substantive Due Process Standard Allows the Use of Both a Substantive Due Process and a Takings Analysis

The nonexclusive substantive due process application permits first prong *Agins* claims under either the "arbitrary and capricious due process" theory or the Fifth Amendment takings theory. This application highlights the difference in standards of review between a due process claim and a takings claim. Furthermore, it demonstrates how applying an exclusive due process theory to a takings claim permits lower courts to elude *Nollan*'s heightened standard of review for takings claims. Avoidance of the "essential nexus" test set out in *Nollan*, 483 U.S. at 837, places the burden of proof for takings claims on property owners. According to this Court's decision in *Dolan v. City of Tigard,* 129 L. Ed. 2d 304, however, the burden of proof for such claims properly lies with the government. *Id.* at 323.

Chief Judge Oakes applied the nonexclusive substantive due process analysis in his opinion for the Second Circuit Court of Appeals in *Southview Association, Ltd. v. Bongartz,* 980 F.2d 84 (2d Cir. 1992), *cert. denied,* __ U.S. __,

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[7] (...continued)
error given that 'takings' law is one of the most confused areas in American jurisprudence").

123 L. Ed. 2d 153 (1993). *See also Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1995) (stating that facts which form basis of "arbitrary and capricious due process" claim may also form basis of takings claim). In *Southview*, a developer advanced substantive due process and takings claims against members of the Vermont Environmental Board. *Id.* at 101 and 107. The complaint alleged that the Vermont Environmental Board's denial of a permit was arbitrary and capricious and failed to substantially advance a legitimate state interest. *Id.*

The Second Circuit affirmed the lower court's dismissal on ripeness grounds. *Id.* at 100. However, Judge Oakes proceeded to analyze the merits of the case.[8] *Id.* at 101-09. Judge Oakes first analyzed plaintiff's substantive due process claim. Rejecting the validity of this claim, Judge Oakes reasoned that government regulation of a landowner's property violates the landowner's right to substantive due process "only when government acts with 'no legitimate reason for its decision.'" *Id.* at 102. Thus, to avoid liability for a substantive due process violation, government need only advance a legitimate reason for its decision. Under a substantive due process theory, plaintiff carries the greater burden of proving that the government's decision was completely irrational. *Id.* at 104.

Next, Judge Oakes analyzed plaintiff's takings claim. Also rejecting the validity of the takings claim, Judge Oakes determined that government regulation effects a taking of property without just compensation when a regulation fails to "substantially advance" a legitimate state interest. *Id.* at 107. Accordingly, to avoid liability for a taking, the government must establish that a nexus exists between the challenged

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[8] Judge Oakes's analysis of the merits did not necessarily represent the official view of the Second Circuit panel. *Southview*, 980 F.2d at 100.

regulation and the state's interest. *Id.* at 108. Under a takings theory, the government carries the greater burden of proving that its decision substantially advanced a legitimate state interest. This result is, of course, contrary to the formulation in *Del Oro Hills.*

Under a nonexclusive due process theory, substantive due process merely supplements takings as a theory of recovery. Under an exclusive due process theory, however, substantive due process is the only means by which plaintiff can recover under the "legitimate state interest" prong of *Agins.* Because substantive due process theory places the burden on the plaintiff to prove that the challenged government regulation lacks any rational basis, the exclusive due process application eludes the "essential nexus" requirements of both *Nollan* and *Dolan.*

E. A "Balancing" Test Applied by Some Courts Subsumes or Ignores the Two-Prong Agins Test

The balancing application effectively analyzes the second prong of the *Agins* test under the three-part balancing test set out in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Courts applying the balancing test either ignore the first prong of *Agins*, or they conclude that plaintiff has failed to satisfy the first prong. To determine whether a regulation has denied the owner economically viable use of her property, courts employing the balancing application analyze: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation interferes with the plaintiff's investment-backed expectations; and (3) the character of the government action. *Id.* Most prominent among cases applying the *Penn Central* analysis is the First Circuit's decision in *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13 (1st Cir. 1993). *See also Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 120 L. Ed. 2d 898 (1992) (applying *Penn Central* balancing

test to analyze second prong of *Agins* test after determining that plaintiff has failed to satisfy first prong); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1993), *cert. denied*, ___ U.S. __, 124 L. Ed. 2d 679 (1993) (remanding to District Court to determine existence of regulatory taking under "economically viable use" analysis in light of *Penn Central* balancing test). *But see Loveladies Harbor v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (supplementing and partially rejecting *Penn Central* balancing test in favor of *Lucas v. South Carolina Coastal Commission* analysis).

In *McAndrews*, a property owner challenged federal legislation which prohibited him from canceling a lease upon the lessee bank's insolvency. *McAndrews*, 989 F.2d at 14. In determining whether the property owner had suffered a regulatory taking under the second prong of *Agins*, the First Circuit separately analyzed each factor of the *Penn Central* balancing test. *Id.* at 18-20. The First Circuit ignored the first prong of the *Agins* test. The court's avoidance of consideration of the first prong of *Agins* arguably led to a result less favorable to the property owner than justified.

F. Other Courts Use Second Prong Takings Analysis Exclusively, Calling the First Prong Irrelevant

Finally, the second prong application limits analysis to the second prong of the *Agins* test, while it consistently ignores analysis of the first prong. Among cases subscribing to the second prong application, *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992), provides a unique analysis. *See also Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (1989), *cert. denied*, 496 U.S. 906 (1990) (restricting takings analysis to second prong of *Agins* test despite lower court's finding that challenged regulation was invalid but not unconstitutional); *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d at 1384. The Eleventh Circuit stated in *Reahard* that just compensation claims always rely on a

second prong *Agins* analysis, and that *Agins*' first prong is irrelevant to such claims. *Reahard,* 968 F.2d at 1136.

In *Reahard*, landowners challenged a county land use plan which limited development on their land. *Id.* at 1133. The landowners conceded that the plan was a valid exercise of police power. *Id.* at 1135. However, they claimed that the county owed them just compensation because it had interfered with the landowners' reasonable investment-backed expectations. *Id.* The Court of Appeals reasoned in *dicta* that just compensation claims assume that the challenged regulation substantially advances a legitimate state interest. *Id.* at 1136. Thus, the only relevant inquiry is the extent to which the regulation deprived plaintiffs of economically viable use of their property. *Id.* The Court of Appeals accordingly vacated the judgment of the District Court and remanded the case for further analysis consistent with its opinion. *Id.* at 1136.

The Court of Appeals' *dicta* regarding just compensation claims conflicts with this Court's decision in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). In *First English*, this Court held that invalidation of a regulation is constitutionally insufficient without monetary payment to compensate for loss of the property's use during the time in which the regulation was in effect. *Id.* at 321. Contrary to the reasoning of the Eleventh Circuit in *Reahard*, under *First English* a just compensation claim is available when a regulation takes property because it fails to substantially advance a legitimate governmental interest. Thus while a takings case may assume the validity of the challenged regulation as in *Lucas*, that should not be a necessary predicate.

CONCLUSION

Despite having suffered substantial damages as a result of an unlawful ordinance, Del Oro Hills was denied the right to establish a claim for an inverse condemnation taking. Del Oro Hills should be given an opportunity to prove there was a taking because the offending regulation failed to substantially advance a legitimate governmental interest. In proving a taking, of course, Del Oro Hills may rely on the heightened level of judicial scrutiny of regulations not otherwise available in mere due process claims. Additionally, Del Oro Hills should have right to recover whatever takings damages it can prove it suffered during the period of time in which the offending regulation was in place.

The two-prong *Agins* test is a central pillar of takings jurisprudence. Topple it, and much of the edifice of takings law comes tumbling down; and with such a collapse the fundamental individual right to own and reasonably use property free from arbitrary and inequitable regulations will be severely abridged. If such a dramatic reduction in the constitutional protections for property rights is to occur, it will have to come from the United States Supreme Court and not the California Court of Appeal.

For the foregoing reasons amicus Pacific Legal Foundation respectfully urges this Court to grant certiorari.

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Respectfully submitted,

* JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorney for Amicus Curiae
Pacific Legal Foundation